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SUPREME COURT, U.S.

No. 82-78

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

DONALD LEE SHIRLEY,

Respondent.

On Appeal from the Supreme Court

of California

MEMORANDUM FOR RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

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No. 82-78

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THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Petitioner,	)
vs.	)
DONALD LEE SHIRLEY,	)
Respondent.	)

MEMORANDUM FOR RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

Respondent files this memorandum to advise the Court of facts which, in our view, render this cause moot.

On August 17, 1982, following retrial, respondent was acquitted of the criminal charges against him.[1/] MR. SHIRLEY is, accordingly, beyond any discernible penal interest of petitioner. Since "an actual controversy must exist at [all] stages of appellate or certiorari review and not simply at the date the action is initiated" (Roe v. Wade, 410 U.S. 113, 125 (1973)), respondent's acquittal and discharge deprives the cause of "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227,

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1/ In addition, by opinion filed on September 2 , 1982, a majority of the California Supreme Court upheld the constitutionality of "Proposition 8," an initiative measure known as the "Victims' Bill of Rights," which includes the addition to Article I, § 28(d) of the California Constitution, the text of which is set forth in respondent's Opposition to Petition for Certiorari at 4. In light of that provision's explicit limitation on judicially-created rules of evidence in California courts, the prospective vitality of the California Supreme Court's decision in Shirley is problematical.

240-241 (1937).[2/]

There is, in short, no longer a "case" within the meaning of Article III upon which any decree of this Court could operate. Accordingly, since "[i]t has long been [this Court's] considered practice not to decide abstract, hypothetical, or contingent questions, or to decide any constitutional question in advance of the necessity for its decision" (Alabama State Federation of Labor v. McAdery, 325 U.S. 450, 461 (1945)), counsel respectfully suggest that the issues arising out of the now fully concluded proceedings against MR. SHIRLEY are moot and that California's petition for certiorari ought to be denied on that ground.

Dated: September 8, 1982.

Respectfully submitted,

EPHRAIM MARGOLIN
STEPHEN C. HOSFORD

By _____
Ephraim Margolin

Attorneys for Respondent

[2/] Mr. Shirley is neither a fugitive from justice (cf. Molinaro v. New Jersey, 396 U.S. 356, 366 (1970)), nor does this cause fall within that narrow class of cases saved from mootness because they present issues "capable of repetition, yet evading review" (Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911). Cf. Quaglino v. People of the State of California, No. 77-1288, cert. denied, 99 S.Ct. 599 (1978).

PROOF OF SERVICE BY MAIL

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PEOPLE OF THE STATE OF CALIFORNIA,
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DONALD LEE SHIRLEY,
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the City and County of San Francisco, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 240 Stockton Street, San Francisco, Ca. 94108.

I served the within MEMORANDUM FOR RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT: An original and nine (9) copies on the U.S. Supreme Court as follows: Alexander L. Stevas, Clerk, Office of the Clerk, Supreme Court of the United States, Washington, D. C. 20543, of which a true and correct copy of the document filed in the cause was affixed, by placing one (1) copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee, respectively, as follows:

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Each envelope was then sealed and, with the postage prepaid, deposited in the U.S. mail by me at San Francisco, Ca., on the 8th day of September, 1982.

There is a delivery service by U.S. mail at each place so addressed or regular communication by U.S. mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 8th day of September, 1982.

DEANNA T. GALESTIAN